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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 78-1759

JOAN E. HELM, individually and as Guardian ad Litem for DAVID WILLIAM QUEDENS, an Incapacitated Person,
Petitioner,

vs.

PACIFIC POWER AND LIGHT CO., a Maine corporation, MOBILE AERIAL TOWERS, INC., an Indiana corporation and THE IDAHO FIRST NATIONAL BANK, a National Association,
Defendants.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I

RESPONDENTS PROCEDURAL OBJECTIONS ARE WITHOUT MERIT

Respondent, PACIFIC POWER AND LIGHT CO., at page 7 of its brief argues that this case involves an issue of importance only as to the parties and that it involves no issue of any real importance to the public. We submit that while this case of course is extremely important to the parties, that it is of equal importance to the public. It is difficult to conceive of an issue which is more important to the public than prohibiting trial courts from granting

summary judgments on non-existent evidence such as was done in this case, or in granting summary judgments where there are material and substantial issues of fact which should be tried by the jury rather than on affidavit, such as once again was done in this case. Our State Appellate Courts, with the *regularity of clock work,* have found it necessary to reverse summary judgments and to remind trial courts that litigants have a constitutional right to their day in court on disputed issues of fact and that trial courts should not attempt to decide cases on the basis of disputed evidence contained in affidavits.

Proof of the fact that this court also shares this same view and that it considers a litigant to have a constitutional right to a jury trial, where there are important issues of disputed facts involved, is the fact that on numerous occasions this Court has granted reversals in cases involving summary judgments where as between the parties the issues primarily concerned them. Some of the numerous cases in which reversals of such summary judgment were granted by this Court are as follows: *Adickes v. S. H. Kress & Co.* (1969) 398 U.S. 144; *Sartor v. Arkansas Natural Gas Corp.* (1944) 321 U.S. 620; *Poller v. Columbia Broadcasting System, Inc.* (1961) 368 U.S. 464; *United States v. Diebold, Inc.* (1961) 369 U.S. 654; *Carter v. Stanton* (1972) 405 U.S. 669; and *Dombrowski v. Eastland* (1966) 387 U.S. 82.

There are also numerous other cases where this Court has reversed the actions of trial courts in granting nonsuits, directed verdicts, and in giving jury instructions where there are disputed issues of fact which required the

jury's determination and where the issues should not have been decided by the court. Many of these cases involved disputes between private citizens as to their respective rights and yet this Court felt it so important that litigants not be deprived of their constitutional right to a jury trial that *certiorari* was granted. For some of these cases see *Halliday v. United States* (1941) 315 U.S. 94; *Spring Co. v. Edgar* (1878) 99 U.S. 645; *Head v. Hargrave* (1881) 105 U.S. 45; and *Sonnentheil v. Christian Morelein Brewing Co.* (1898) 172 U.S. 401.

In *Poller v. Columbia Broadcasting, supra,* this Court set forth the following principles with reference to the granting of summary judgments:

> "Summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions filed in the case 'show that [except as to the amount of damages] there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Rule 56(c), Fed. Rules Civ. Proc. This rule authorizes summary judgment 'only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, . . . [and where] no genuine issue remains for trial . . . [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.' *Sartor v. Arkansas Natural Gas Corp.* 321 U.S. 620, 627 (1944)"

In *United States v. Diebold, supra,* this Court states in reversing a summary judgment as follows:

> "On summary judgment, the inferences to be drawn from the underlying facts contained in such materials *must be viewed* in the light most favorable to the

party opposing the motion. A study of the record in this light leads us to believe that inferences contrary to those drawn by the trial court might be permissible. The materials before the District Court having thus raised a genuine issue as to ultimate facts material to the rule of *International Shoe Co. v. Federal Trade Comm'n,* it was improper for the District Court to decide the applicability of the rule on a motion for summary judgment."

In effecting reversal in *Sartor v. Arkansas Natural Gas Corp., supra,* this Court, at page 627, states as follows:

"The Court of Appeals below heretofore has correctly noted that Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial and that the purpose of the rule is not to cut litigants off from their right to trial by jury if they really have issues to try. *American Insurance Co. v. Gentile Brothers Co.,* 109 F.2d. 732; *Whitaker v. Coleman,* 115 F.2d. 305. In the very proper endeavor to terminate a litigation before it for the fourth time, we think it overlooked considerations which make the summary judgment an inappropriate means to that very desirable end."

In the instant case, the court below, without any question, has violated each and every one of these familiar rules applicable to summary judgments as heretofore articulated by this Court, and if *certiorari* is not granted by this Court, this young man who received catastrophic injuries will lose his right to his day in court and the opportunity to prove his case as he is entitled to do under the United States Constitution and under the prior decisions of this Court. The action of the court below flies in the teeth of and violates the rules applicable to summary judgments as heretofore pronounced by this Court.

The court below, by not deciding this case in accordance with the applicable decisions of this Court, has violated Rule 19A of the Supreme Court Rules. Further, it has violated Rule 19B in that it has decided the Federal question in a way which is in conflict with applicable decisions of this Court as hereinabove set forth. Finally, the court below, in violation of Rule 19B, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision and review. Quite obviously, if this Court did not have the power to review the action of trial courts in granting motions for summary judgments in actions involving disputes between private citizens, then such trial courts could willy-nilly grant motions for summary judgment based on its interpretation of the facts and with the thought that by so doing, they could eliminate cases and clean up the well-known clogged calendars that exist in the Federal District Courts. While it is certainly desirable to speed up litigation and to clear court calendars whenever possible, such an objective should not be achieved at the expense of litigants who have a right to be heard and who have a constitutional right to have their cases tried by juries on the merits. Unfortunately, that result is precisely what took place in the instant case.

II

THERE ARE GENUINE, MATERIAL ISSUES OF FACT WHICH WARRANT A JURY TRIAL AND RESPONDENTS, IN THEIR BRIEF, HAVE IN NO WAY DEMONSTRATED THAT THIS IS NOT CORRECT

With reference to the merits of petitioner's position that he is entitled to his day in court, we would like to make the following comments and observations:

1. In our opening brief we set forth the numerous genuine material issues of fact which exist and the evidence which supports same. Respondents, in their brief, follow the same procedure that they did in the trial court, namely to simply ignore the evidence which is in petitioner's favor and only argue the evidence which supports their view as if said contrary evidence was non-existent. We submit that such conduct and procedure is highly improper and that if this Court looks at the evidence supporting plaintiff's views with reference to the liability of each defendant, it will readily perceive that there are contested issues of fact which should be tried as to each defendant.

2. In our opening brief, we pointed out at pages 6 and 8 evidence from which a jury could well conclude, (1) that DAVID WILLIAM QUEDENS did not know about the small wires that transversed the street in question in an unusual place, (2) that DAVID was in no way bent on an act of self-destruction, and (3) that DAVID, either because of the sun exposure or otherwise, was clearly oblivious to the fact that he was in the vicinity of the high, deadly, and uninsulated small wires in question. The trial court opinion that DAVID was bent on an act of self-destruction and/or

suicide simply cannot stand as a matter of law because there is substantial evidence to the contrary. If DAVID was not bent on an act of self-destruction and/or suicide as found by the trial court, then the summary judgment must fall because if DAVID knew nothing about the wires, or even if he had been told about them some two weeks before, then we still have the right to have a jury determine all of the numerous defenses that exist to the doctrine of contributory or comparative negligence and which are discussed in our opening brief, such as momentary forgetfulness, distraction, absorption in one's work, attention to one's work, the right to expect safety, the applicability of § 302 of the Restatement of Torts, etc. None of these latter issues can properly be decided as a matter of law. They are questions of fact. The conduct and reasonableness of DAVID QUEDENS actions were questions of fact for the jury to determine under all of the circumstances applicable to this case. Respondents, in their reply brief, answer this point by simply ignoring it. They do not discuss the evidence supporting petitioner's view of the evidence and in no way argue that, if believed, it would not be sufficient to support the conclusions urged by petitioner.

3. PACIFIC POWER, in its brief, in essence, argues that the case of *Probart v. Idaho Power Co.*, (1953) 258 P. 2d 361, entitled the power company to a verdict as a matter of law and that based upon *Probart* the Court was required to grant summary judgment. We submit that this assertion is preposterous. Any fair reading of the cases cited by petitioner in his opening petition at pages 9 through 13 will disclose that once a power company has knowledge of the fact that workmen or others are operating in the vicinity of

its *uninsulated* high-voltage lines, that the power company then has a positive, *affirmative,* duty to take immediate steps and actions to do whatever is necessary to prevent injury from occurring. In our opening brief, we set forth many different types of action that a power company can take under such circumstances. We point out, in our opening brief, that under the uncontradicted facts in this case, the defendant power company had *actual* knowledge of the changed circumstances that existed in the vicinity of these unusually placed, high, small, little wires, and yet didn't take one step, as it was required to do, to prevent injury. The said *Probart* case simply is not applicable to the facts of this case nor to the general law on the subject matter because in the *Probart case,* there is absolutely no evidence that the power company had any knowledge whatsoever of the fact that there were changed circumstances or that work was going on in the area. The Court in *Probart* stresses this point and in no way states or indicates that the general rule of liability would not be applicable in Idaho, and that where there is knowledge, the power company does not have a positive, *affirmative* duty to take immediate steps to prevent injury. Respondent, power company, simply ignores this point and states as a fact that the facts in *Probart* are the same as in our case and that therefore *Probart* is applicable. Nothing could be further from the truth. Said respondent simply fails to discuss and/or meet or even talk about the point of law in question.

4. All three respondents, in their briefs, state as a matter of fact, that James G. Maria, in a sworn affidavit done at a time when he was not subject to cross-examination, specifically pointed out the three little "tap" line wires that crossed the street in the middle of the block and which were responsible for DAVID's injuries. These wires ran east and west generally rather than north and south. The power company, in its brief at page 4, admits that there was a three-wire set which ran along the trees and parallel with the trees in a north-south direction. In other words, there were three sets of wires running along the street parallel with the trees and *then there were the tap line wires which ran across the middle of the block and which were the ones that injured DAVID.* The conclusion reached by respondents and which they have continuously attempted to foist on both the trial court, the Court of Appeals, and now this Court that the wires pointed out by Maria were the tap wires simply is not warranted by any reasonable and/or fair reading of his affidavit. His exact words are contained at pages 598 and 599 of his affidavit and are as follows:

> "When we viewed the premises, we discussed the type of trimming work which needed to be done. Some of the trees needed to be rounded over and given a symmetrical shape and other trees needed to have the dead limbs removed. During this discussion, I called David's attention to the location of the power lines near the trees which were to be trimmed and instructed him to be careful and not to get the bucket or any part of the boom any closer than six feet to the power lines."

Certainly one could reasonably conclude, that since Maria was specifically pointing out the trees that needed to be trimmed, that the wires which he pointed out were the three which ran along the street and parallel with the

trees. He does not state that he specifically called the unusually placed three tap wires to DAVID's attention. In fact, he does not even state where he was standing when he pointed out said wires. For ought that appears, he could have been up the block, down the block, or even around the corner. Since all inferences in a motion for summary judgment are to be made in favor of the party opposing the motion, the court should not have determined as a matter of law that the wires which Maria was talking about were the three "tap" wires rather than the ones which ran parallel with the street. There is thus no evidence in the record which shows as a matter of law that Maria, or anyone else, ever pointed out the three "tap" wires to DAVID. The statement of respondents to said effect is simply unwarranted and unsupported by the evidence. Finally, we would point out that this man who was a former employee of Davey Tree Company was obviously approached unilaterally by someone on behalf of the respondents and that his testimony has never been subjected to the crucible of cross-examination. Further, we would point out that even, assuming arguendo, that he had pointed out these little wires some two weeks before the time of the accident, DAVID would still have the right to have the jury determine whether or not the defendants nevertheless were negligent for not taking steps to make the area safe, by either insulating the wires, turning them off, marking them, lowering them, or taking any one of the numerous other steps suggested by the cases cited by us in our opening petition, and further, whether or not DAVID might be absolved by the doctrines of momentary forgetfulness, etc., herein-above cited. As set forth in our

opening petition, Idaho follows the doctrine of comparative negligence and accordingly, even if the jury found that DAVID was negligent in some degree, assuming arguendo that he had in fact been told about the wires and thereafter forgot about them, it would still be a question for the jury to determine the respective percentages of fault of the respondents and of DAVID. The jury was deprived of this opportunity by the action of the trial court in this case in granting summary judgment.

5. Respondent, MOBILE AERIAL TOWERS, INC., simply ignores and fails to discuss both the case law and the Idaho statute set forth by us in our opening petition which clearly indicate that both under Idaho case law and under the Idaho statute, a manufacturer who places his merchandise in the stream of commerce, is subject to jurisdiction in whatever state the product goes into, if injury occurs in that state. Said defendant cannot and has not cited any Idaho case or other case or statute which precludes jurisdiction. We submit that as indicated by us in our opening petition the overwhelming trend of authorities under modern-day products liability law, is to hold the manufacturer of a product subject to jurisdiction in whatever state the product causes injury, once the product is placed into the stream of commerce with knowledge that it may go into that state.

6. Respondent, MOBILE, does not address itself, in its responding brief, to the fact that the trial court based its decision with reference to the latent vs. patent dichotomy on the infamous *Campo v. Schofield* case (1950) 301 N.Y.

468, 95 N.E.2d 802 *and its progeny* and that said case has been overruled by the court which established it and that it no longer represents the modern trend in this country. Please see our opening petition for discussion of the authorities which now clearly hold that the right to recover in a products liability design case no longer depends on such a distinction.

7. The IDAHO NATIONAL BANK cites no cases whatsoever to support its contention that §§ 416 and 427 of the Restatement 2d. of Torts applies only where the defendant employer actually owns the property where the work is being performed. Any fair reading of said sections would indicate that the applicability of said sections does not depend upon the employer owning the underlying real property. Quite obviously, the sections are designed to require the employer to take steps to provide protection for workmen where there are special or unusual risks of harm in the work area.

In the instant case, as pointed out in our opening petition, the BANK knew of these special and/or unusual risks of harm before the date of this accident, knew that the work was taking place, and yet did not take *any steps whatsoever* to provide any safety and/or protection. Accordingly, we submit that the BANK is liable as a matter of law for the injuries sustained by DAVID QUEDENS. While the evidence is uncontradicted that the BANK knew about these wires, there is no evidence, contrary to the assertions of the respondents, that DAVID knew about the

wires, unless one interprets the above-mentioned Maria declaration to mean that Maria was referring to the three "tap" wires which caused the injury. Under the familiar rules applicable to motions for summary judgment, we do not believe that such an interpretation is possible. In short, one of the glaring failures in all three respondents' briefs is the lack of recitation of any evidence which would support any such conclusion.

CONCLUSION

In conclusion, we submit that there is ample authority to support both the power, the duty, and the right of this Court to grant *certiorari* in a case where the U.S. District trial courts have ignored and disregarded the familiar rules applicable to motions for summary judgment. Second, we submit that if one looks at the merits of the motions for summary judgment, it is quite obvious that there is ample evidence to support findings of fact quite contrary to those arrived at by the trial court on the issues of whether DAVID WILLIAM QUEDENS was bent on an act of self-destruction, whether he knew about the wires in question, whether or not, even assuming arguendo that he knew about the wires, his conduct was excused by any of the familiar rules applicable to such situations, and further as to the duties of the three defendants to provide such protection as would have prevented the injury under the circumstances of this case. We sincerely submit that if there

was ever a case where this Court should grant a reversal following the granting of a summary judgment, that this is it.

Dated: September 12, 1979.

Respectfully submitted,

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